NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of Public Meeting of December 16, 2011

Supreme Court Courtroom
Frank Rowe Kenison Supreme Court Building
One Charles Doe Drive
Concord, NH 03301

The public hearing and meeting was called to order at 1:00 p.m. by Justice Robert J. Lynn, Committee Chair. The following Committee members were present: William F. Ardinger; Robert L. Chase; Hon. Laurence Cullen; Jeanne P. Herrick, Esq. (arriving late); Martin P. Honigberg, Esq.; Hon. Richard B. McNamara; Hon. William L. O'Brien; Jennifer L. Parent (leaving early), Esq.; Patrick Ryan, Esq.; Raymond W. Taylor, Esq.; and Hon. Robert J. Lynn.

Also present were Secretary to the Committee, Carolyn Koegler, Esq.; and Irene Dalbec, staff.

1. Public Hearing

The Committee received comments from the public on the following matters, as set forth in the November 2, 2011 public hearing notice:

(a) Photographing, Recording and Broadcasting (regarding proposed amendments to Superior Court Rule 78, Circuit Court-District Division Rule 1.4, Circuit Court-Probate Division, Rule 78, and Circuit Court Family Division Rule 1.29 submitted to the Rules Advisory Committee by the New Hampshire Committee on the Judiciary and the Media to clarify the presumption that the photographing, recording and broadcasting of all court proceedings is permissible, and to eliminate the differences in the procedures between the various trial courts around the state). See November 2, 2011 Public Hearing Notice, Appendices A-D.

(b) Supreme Court Rules 53.2(B)(4) (regarding exemptions from minimum continuing legal education requirements. No changes being proposed to the temporary rule now in effect). See November 2, 2011 Public Hearing Notice, Appendix E.

(c) Superior Court Rules 170, 51, 62(I)(D), 62(III) (regarding alternative dispute resolution. No changes being proposed to the temporary rules now in effect). See November 2, 2011 Public Hearing Notice, Appendices F-I.

(d) Supreme Court Rule 61 (regarding circuit court judicial certification. No changes being proposed to the temporary rule now in effect). See November 2, 2011 Public Hearing Notice, Appendix J.

The vast majority of the comments received related to item (a) and supported the view that the public and media should have greater access to courtroom procedures than is provided for by the proposed rule amendments. No comments were made regarding item (b).

Two letters of comment were submitted to the Committee regarding item (c). Attorney Adele Fulton of Gardner, Fulton & Waugh and attorney Spector-Morgan of the Mitchell Municipal Group both expressed concern about temporary Superior Court Rule 170(A)(2), adopted by Supreme Court Order dated June 8, 2011, which expanded the scope of proceedings subject to mandatory ADR by eliminating an exemption for actions by or against or appeals from decisions of the state, counties or municipalities. Ms. Laurie Levin, director of the office of mediation and arbitration spoke regarding item (c), and stated that the position of her office and of Chief Justice Nadeau is that nothing be changed in the current temporary rule, but that it should remain temporary until the next scheduled public hearing of the Rules Advisory Committee. Ms. Levin explained that a subcommittee comprised of judges, court clerks, practitioners and mediators has been convened to determine whether Superior Court Rule 170 should be made permanent in its current form, or whether amendments should be made to the rule.

One comment was made regarding item (d).

2. Discussion and Vote on Public Hearing Items

(a) Photographing, Recording and Broadcasting

Justice Lynn spoke regarding the proposed rule amendments. He noted that a letter from Chief Justice Nadeau to the Advisory Committee on Rules dated December 16, 2011 recommends that the rules be adopted on a temporary basis so that an assessment can be made regarding how the rule operates in practice. Justice Lynn also noted that the rule amendments, as drafted, are designed to apply across the board, and do not make a distinction between the established media and others. The way that the rule is drafted, a distinction between the groups is made only where there is insufficient space to allow everyone to film. In this limited circumstance, the court is permitted to give preference to the established media because it is assumed that distribution to the public is more likely to occur through the established media. Justice Lynn's view is that the proposed rule amendments would effectuate enormous changes in terms of liberalizing access to courtroom proceedings. While there may be some problems in that it may not go far enough, or there may be a need to make greater

distinctions between the traditional media and others, he believes that the Committee should recommend to the court that the amended rule be put into effect on a temporary basis because the amended rule moves in the right direction.

Speaker O'Brien stated that he was persuaded by the testimony offered at the public hearing that there should be no restrictions on access. He believes that there should be a rule that a court does not have the right to restrict people who have a right to be present in a courtroom from recording the proceedings that occur there. Given advances in technology, if members of the public are present, they are able to record.

Judge McNamara stated that he found the testimony regarding the need for a presumption of openness persuasive. However, he also noted, regarding testimony offered about openness in the legislature, that there is a difference between the legislature and the courts. For example, jurors are compelled to go to court, and it is necessary to be sensitive to the rights of jurors. In addition, in certain kinds of cases, prosecutors can have some difficulty persuading victims to testify, and this might become even more difficult if victims know that the testimony they provide in court will be recorded. There should be a presumption that members of the public have a right to record courtroom proceedings, but jurors and victims also have rights that should be taken into consideration. Proposed amended superior court rule 78 and the other proposed amended rules related to photographing, recording and broadcasting balances these rights.

Attorney Honigberg noted that current superior court rule 78 should be amended, and acknowledged that perhaps proposed superior court rule 78 does not go far enough. He believes that the Committee should recommend that the court adopt the proposed superior court rule 78 on a temporary basis so that something is in place, but that the Committee should also recommend that discussions about the need for additional amendments should continue. Judge Cullen concurred with Attorney Honigberg's suggested approach, noting that he too has some concern regarding the conflict of rights at issue here. Attorney Ardinger echoed this concern and noted that in a courtroom there are many rights—a right to privacy, a right to counsel, for example -- that are not present in the legislative process. He noted that there has to be a way to process conflicts in these rights. He agrees that Attorney Honigberg's approach – to adopt the temporary rule, but to continue to discuss how to value and balance these competing rights – is a good approach.

Upon motion made by Attorney Honigberg, and seconded by Speaker O'Brien, the Committee unanimously voted to recommend that: (1) the Supreme Court repeal the existing trial court rules regarding photographing, recording and broadcasting and adopt new Superior Court Rule 78, new Circuit Court-District Division Rule 1.4, new Circuit Court-Probate Division, Rule 78, and new Circuit Court Family Division Rule 1.29 on a temporary basis; and (2) the Court refer the

issue back to the Advisory Committee on Rules so that it can appoint a Committee to continue to study the issue of whether further amendments to the new rules are necessary.

(b) Supreme Court Rules 53.2(B)(4)

Following brief discussion, and upon motion made by Judge Cullen and seconded by Attorney Ardinger, the Committee voted unanimously to recommend that the Supreme Court adopt temporary supreme court rule 53.2(B)(4), regarding exemptions from continuing legal education requirements, on a permanent basis.

(c) Superior Court Rules 170, 170, 51, 62(I)(D) and 62(III) (Alternative Dispute Resolution)

Judge McNamara noted that certain attorney members of the ADR subcommittee are unhappy with the current rule. He recommends keeping the rule temporary and expanding the ADR subcommittee to add members of the New Hampshire Bar Association and the New Hampshire Association for Justice. Attorney Herrick suggested that in light of the concerns expressed in the letters from attorneys Adele Fulton of Gardner, Fulton & Waugh and Laura Spector-Morgan of the Mitchell Municipal Group about temporary Superior Court Rule 170(A)(2), that an effort be made to reach out specifically to attorneys representing municipalities.

Upon motion made by Justice Lynn and seconded by attorney Ardinger, the Committee voted not to recommend to the Court that temporary rule 170 be adopted on a permanent basis, but that the ADR subcommittee assess whether Superior Court Rule 170 should be made permanent in its current form, or whether amendments should be made to the rule. The ADR subcommittee will make a recommendation regarding Superior Court Rule 170 by the date of the Committee's meeting in June.

(d) Supreme Court Rule 61 (circuit court judicial certification)

Upon motion made by Judge Cullen and seconded by judge McNamara the Committee unanimously voted to recommend that the Supreme Court adopt this temporary rule on a permanent basis.

3. Approval of the Minutes

A proposal was made by attorney Honigberg to correct the September 16, 2011 minutes to reflect that the subcommittee comprised of attorneys Honigberg, Ardinger and Gordon was also charged with the task of developing proposed rules and/or rule amendments to enable e-service among attorneys in litigation. (1) Upon motion made and duly seconded, the Committee unanimously voted to

approve the minutes of the Committee's December 16, 2011 meeting, as amended.

4. Status of Pending Items

(a) District Court Rules of Civil Procedure and Probate Court Rules of Civil Procedure and Probate Administration

There was brief discussion regarding the fact that the staff of the Circuit Court has been cross-trained, and the call center is being set up. It was agreed that the Committee would take no action on this item.

(b) 2008-013, Judicial Conduct Committee Procedures

Justice Lynn has recused himself from participation in discussions regarding Supreme Court Rules 40(c)(5) and 40(12). He will particpate in discussions related to 40(13).

Carolyn Koegler reported that following the September 16 meeting, at the direction of the Committee, she had forwarded to the JCC: (1) copies of the letters from the JCC to the Supreme Court proposing changes to Supreme Court Rules 40(5)(c), 40(12) and 40(13); and (2) a copy of attorney Honigberg's memo. She also informed the JCC that the Committee had reviewed the JCC correspondence and requested that the JCC: (1) consider the additional proposed amendments to the proposed amended rules made in attorney Honigberg's memo; and (2) if the JCC agrees with the subcommittee's proposed amendments, it incorporate them into final proposed rules and submit the final proposed rules to the Committee by December 8.

By letter dated November 21, 2011, the Chair of the JCC informed the Committee that it had a number of substantive concerns regarding the proposed amendments and had referred the proposed rules to the JCC Rules subcommittee. The JCC subcommittee reviewed and discussed the proposed amendments and determined to work on a more comprehensive set of amendments to be considered and approved by the full Judicial Conduct Committee and then submitted to the Advisory Committee on Rules at its March 2012 meeting.

Judge McNamara, liason to the JCC, reported that the last meeting of the JCC was on Wednesday, December 14. Some additional changes to the proposed amendments were discussed. There was particular concern about the use of the term "warning," and the JCC appears to be settling on the word "caution," rather than "warning." The JCC plans to submit a proposal to the Advisory Committee on Rules in March or June.

(c) 2010-015 Model Rules for Client Trust Account Records

Carolyn Koegler reminded the Committee that she had sent a letter dated July 5 to attorney Rolf Goodwin, informing him that the Committee had agreed with his proposal that the Ethics Committee and the Attorney Discipline Office work together to provide a joint recommendation regarding the ABA Model Rules for Client Trust Account Records, PCC Rule 1.15(a) and Supreme Court Rule 50. She also reported that she had recently been in contact with attorney Goodwin, who anticipates that the Ethics Committee and the Attorney Discipline Office would submit a joint recommendation prior to the Committee's March 2012 meeting.

(d) 2011-002 Supreme Court Request to Review the Provisions of Supreme Court Rule 42 Related to the Admission to the Bar of Foreign Law School Graduates

Carolyn Koegler reported that she continues to work with Eileen Fox and Sherry Hieber (Bar Admissions Coordinator) to draft a proposed amended rule.

(e) 2011-008 Supreme Court Rule 3. Definitions. "Mandatory Appeal."

The Committee reviewed attorney Joshua Gordon's December 9, 2011 letter proposing a solution to address the concern that current Supreme Court Rule 3 is unlawful and unconstitutional because it provides for mandatory review of appeals involving married parents but discretionary review of appeals involving non-married parents.

Mr. Gordon was present at the meeting. At the Committee's request, he explained that his understanding is that the reason the current Rule 3 was adopted was to address a concern by the Court that there were "frequent flyer" appellants using a disproportionate share of the Court's resources. Therefore, subjecting these appellants to a certiorari process would assist the Court in managing its docket. He believes that there may be a simple solution to address both the Court's concern about managing its docket and the concern about the potential unlawfulness of Supreme Court Rule 3. He proposes that the Rule 7 Notice of Appeal forms be amended to require family law appellants (or all appellants, regardless of subject-matter) to disclose in their notice of appeal whether the case being appealed has been the subject of a prior appeal. Specifically, he suggests adding a box to the Rule 7 forms asking, for example, "Has any party ever appealed this or a related case? If so, please supply the docket number and date of prior appeal(s) if known." If the answer to the question is "yes," then the appeal becomes discretionary. Thus, the Court would be able to weed out parents who repeatedly appeal custody orders.

Justice Lynn stated that he believes that the current rule, whether or not unlawful, is confusing. Whether parties are married or unmarried, it is not clear

when an order is "final" in a custody case. He believes that there are two benefits to this "check the box" approach: (1) it would weed out parties who appeal custody orders again and again; and (2) it might discourage parties from appealing temporary custody orders because the first appeal is mandatory, but any subsequent appeals would be discretionary. Attorney Gordon agreed, and suggested that the Court could consider expanding this approach in all cases, to address the management concern.

Speaker O'Brien expressed concern about the proposal. He noted that the parties might be upset about not being able to get out of the trial court. One member of the Committee noted that this approach would entitle parties, whether or not married, to one mandatory appeal. This has the effect of expanding the rights of non-married parents (who, under the current rule, have no mandatory appeals), but not changing the rights of married parents.

Following some further discussion of the issue, Justice Lynn asked Attorney Gordon to amend the language proposed in his letter to: (1) ensure that parties would not be able to "fudge" in response to the "appeal of the same issue" question; and (2) make clear that this is intended to expand the ability of unmarried people to get a mandatory appeal, and to report back to the Committee in March.

A Committee member requested that Carolyn Koegler remove this item as a separate item on the agenda, and include it with the items listed in subsection (h) of the minutes.

(f) 2011-011 Supreme Court Request to Review Individual Superior Court Rules and Rules of Criminal Procedure In Light of Comments Received When New Superior Court Rules and New Rules of Criminal Procedure Were Put Out for Public Comment

The Committee next considered one outstanding issue (juror questionnaires) raised in a May 24, 2011 letter from David Peck to Carolyn Koegler regarding public comments received when the proposed Superior Court rules and new Rules of Criminal Procedure were put out for public comment.

At its June meeting, the Committee considered the following comment, regarding proposed Superior Court Rule 33:

> Rule 33 There is no provision for return & destruction of questionnaires. This leaves the questionnaires available and disposition uncertain. Jurors are very comforted by the fact that the confidential questionnaires are destroyed and no copies remain.

Regarding this comment, and as set forth in David Peck's May 24, 2011 letter:

> The court requests that the Rules Committee review the relevant rules as well as the jury questionnaire form and Superior Court Administrative Order 30 with respect both to whether any provision regarding return and destruction of questionnaires should be added to the rules and whether the rules, form and/or administrative order should be amended to ensure consistency among them.

A subcommittee comprised of attorneys Herrick and Taylor was asked to consider this issue, and to report back to the Committee at the December meeting, with its recommendation about the issue. In particular, the subcommittee was asked to consider: (1) whether a lawyer should only be permitted access to jury questionnaires, or whether they should also be allowed to copy them; (2) if copies are permitted, should there be a requirement that the copies be returned; (3) should the form be revised to request less information than is now being requested (that is, to be more like the federal form).

Attorney Taylor distributed a December 16, 2011 memorandum, addressing the following question: "Whether any provision regarding return and destruction of juror questionnaires should be added to the rules and whether proposed Superior Court Rule 33(a), proposed Criminal Procedure Rule 22(a), and jury questionnaire form and/or Administrative Order 30 should be amended to insure consistency." The subcommittee recommends amending the proposed rules to provide that: (1) juror questionnaires may only be reviewed at the Clerk's office by attorneys or parties representing themselves who have a jury case scheduled for trial, provided, however, that an attorney may designate another attorney in his or her office or a secretary or paralegal to review the questionnaires for them; (2) persons reviewing the questionnaires may take notes; and (3) attorneys and parties representing themselves will be permitted to have the questionnaires with them in court during jury selection. The subcommittee also recommends that Supreme Court Administrative Order 2009-03 be amended to provide that juror questionnaires be destroyed at the end of a juror's service and that such provision be incorporated into the proposed Superior Court Rules.

Discussion ensued regarding the memo. Attorney Taylor noted that most states do not have juror questionnaires, and he proposes cutting down on the number of questions that are asked in the questionnaire. Other Committee members opined that although there has never been an abuse of juror questionnaires, there is a need to ensure juror privacy, and that more must be done in New Hampshire to safeguard juror privacy. Justice Lynn noted that there are arguments to be made on both sides regarding how/whether juror information is distributed. He inquired whether this is an issue for the legislature. Speaker O'Brien noted that this issue had come before the legislature before and that people were quite upset about the amount of information being requested in the questionnaire, which is more than the statute requires.

Another Committee member noted that there is a tension between the rights of the defendants, and the privacy rights of the juror. Attorney Taylor stated that what the subcommittee proposes attempts to strike a balance between these competing rights. Jurors continue to complete questionnaires, but then the court collects the questionnaires and destroys them. It was noted that it might be a good idea to add to the video shown to the jury an explanation about the need for the questionnaire.

Jeanne Herrick suggested, and it was generally agreed, that the issues related to juror questionnaires are larger than can be resolved by a subcommittee. Justice Lynn inquired whether, if a larger committee is formed to address this issue, there should be legislative participation. Speaker O'Brien agreed that it would be a good idea to have legislative participation, but that the process should be court-directed. Members of the committee suggested that the following should be included in a committee assigned to address this issue: (1) a member of the Senate; (2) a representative from the judiciary committee; (3) a superior court judge; (4) someone who practices criminal law; (5) a representative from the Attorney General's Office; (6) a representative of the public defender; (7) someone who has served as a juror.

Justice Lynn agreed that he would speak with Attorney Taylor, and that, together, they would generate a list of people to serve on the committee, drawing from various stakeholders. It was agreed that Justice Lynn would appoint a committee to put together a comprehensive proposal to address the issue of juror questionnaires. The committee will be tasked with considering: (1) what information should be requested from jurors; (2) how that information should be treated, with respect to confidentiality; and (3) what the mechanics will be regarding the dissemination and collection of that information. The committee will also consider whether the committee's proposal will require legislation. The goal will be for the committee to present a proposal to the Advisory Committee on Rules by its Friday, September 14, 2012 meeting.

(g) 2011-014 Counsel Fees and Guardians Ad Litem Fees Rules

There was discussion regarding amendments to Supreme Court Rule 48(2) and 48-A(2) which were adopted on a temporary basis by Supreme Court Order dated July 12, 2011, and referred back to the Committee for its recommendation as to whether they should be adopted on a permanent basis. At the September 16 meeting of the Committee, it was decided that the temporary rule should not be put out for public hearing in December, but should be left as a temporary rule until June, so that Judges Nadeau, Kelly and King would have some time to assess the impact of the temporary rule. It was also agreed that Justice Lynn would apprise Judges Nadeau, Kelly, King about the status of this item, and to ask them to provide their input at the Committee's meeting in March.

Committee members directed Carolyn Koegler to write to Judges Kelly, King and Nadeau, to request their input regarding the temporary amendments to Supreme Court rules 48(2) and 48-A(2), and their opinion as to whether the amendments should be adopted on a permanent basis. Because the Committee's goal is to put the temporary amendments out for public hearing in June, the Committee would need to receive input from the judges no later than the March 16, 2012 meeting.

(h) 2011-015, E-Filing, Supreme Court Rule 7, Supreme Court Rule 3

The Committee next considered two issues raised in an August 3, 2011 letter from attorney Joshua Gordon to Carolyn Koegler. In the letter, Mr. Gordon raised three issues: (1) whether it might be possible to implement some kind of system to allow attorneys to share pleadings and documents electronically, even before e-filing comes to New Hampshire; (2) whether Supreme Court Rule 7(1)(B) & (C), should be amended; and (3) the constitutionality of Supreme Court Rule 3 (discussed in (e) above) . At the September meeting of the Committee, a subcommittee comprised of Attorney Honigberg, Attorney Gordon and Attorney Ardinger, was formed to address issues (1) and (2). Attorney Gordon provided the Committee with memoranda summarizing the recommendations of the subcommittee regarding these issues.

(i) Exchange of Pleadings By E-mail

Attorney Gordon referred to his December 15, 2011 memorandum, "email service among lawyers," and summarized for members of the Committee how allowing lawyers to exchange pleadings by email would work in practice. The key components of the subcommittee's proposal include:

(1) it is an opt-in system;
(2) all parties to the litigation must opt-in;
(3) pro se parties are not eligible;
(4) the agreement among lawyers to file pleadings by email must be filed with the court at the earliest possible time (i.e., in superior court cases, at the structuring conference);
(5) email address at which a lawyer can expect to be properly served is limited to that listed on the New Hampshire Association members' website;
(6) Supreme court rule must be amended to impose duty on bar association members to keep email addresses listed on the bar association website current;
(7) E-Mail header should included caption of case and its docket number;
(8) Only acceptable file format is .PDF files.
(9) Three types of indications of signature are permitted.

(10) The court receives an original signed copy of the pleading.

Jeanne Herrick noted that there is a concern about what happens if people are on vacation, and suggested a provision allowing for email to back-up counsel or administrative staff. Speaker O'Brien noted that there seems to be an assumption that if attorneys follow the process, a pleading will be deemed received even if it was not, in fact, received. What happens if an email is identified as spam and filtered out? In response to these concerns, attorney Honigberg noted that these concerns exist with regular mail service as well, and emphasized that this is an opt-in system, and no one is required to do this.

It was suggested that the subcommittee seek input from the Bar Association and Superior Court Judges, and perhaps others, about this proposal. It was also noted that there is an administrative order recently released, 2011-46, allowing for the exchange of pleadings by email.

It was generally agreed that the Committee would like to put the proposed amendments out for public hearing in June. The subcommittee was asked to draft specific language, obtain input from the Bar (specifically the Committee on Cooperation with the Courts), and to report back to the Committee.

(ii) Supreme Court Rule 7

The second issue raised in attorney Gordon's August 3, 2011 letter is a concern about an ambiguity in Supreme Court Rule 7. Mr. Gordon distributed the subcommittee's December 15, 2011 memorandum, "Notice of appeal deadline when lower court grants motion for reconsideration," which identifies the problem presented by Supreme Court Rule 7 as follows:

> Supreme Court Rule 7 currently provides, in part, that appeals "shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits. SUP.CT.R. 7(1)(A) and 7(1)(B). The rule then defines "decision on the merits," and states:
>
> > A timely filed post-trial motion stays the running of the appeal period for all parties to the case in the trial court including those not filing the motion. Untimely filed post-trial motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period. Successive post-trial motions will not stay the running of the appeal period.
>
> SUP.CT.R.7(1)(C).

> When a motion for reconsideration is denied, the appeal period is clearly 30 days later. The current rule leaves an ambiguity, however, when a trial court grants a first motion to reconsider. Following a grant, trial courts sometimes simply issue an order, or sometimes hold another hearing and then issue an order. Regardless, one or more of the parties generally files a second round of reconsideration motions which are generally denied. In this situation, it is unclear whether the appeal period begins from the first reconsideration which was granted (a technically correct but somewhat illogical reading of the rule) or whether it runs from the second "successive" reconsideration which was denied (a technically incorrect but more logical reading).

Attorney Gordon noted that his subcommittee had drafted, for the Committee's consideration, a proposed amendment to Supreme Court Rule 7(1)(C) which incorporates an approach followed in the New Hampshire administrative law context. The text of the proposed amendments follows (deletions in ~~strikethough~~ format, additions in **bold**:

> A timely filed ~~post trial~~ **post-decision** motion stays the running of the appeal period for all parties to the case in the trial court including those not filing the motion. Untimely filed ~~post trial~~ **post-decision** motions will not stay the running of the appeal period unless the trial court waives the untimeliness within the appeal period. Successive ~~post trial~~ **post-decision** motions will not stay the running of the appeal period. ~~See Petition of Ellis, 138 N.H. 159 (1993)~~. **unless the trial court's decision on reconsideration creates a newly losing party, in which case any appeal shall be filed within 30 days from the date of the clerk's written notice of the decision on reconsideration.**

SUP.CT.R. 7(1)(C).

Attorney Gordon also noted that, as the memo sets forth in detail, other jurisdictions take an altogether different approach than the approach followed in New Hampshire. The subcommittee believes that while the "automatic stay approach" followed in other jurisdictions may be better in the abstract, implementation would require a re-conceptualization and re-write of New Hampshire's rules in this area.

One Committee member noted that this automatic stay approach is appealing, in that it offers a bright-line approach. However, other Committee members noted that only a small number of cases are impacted by the ambiguity in the current rule. Therefore, it probably does not make sense to make the changes to the appellate rules and procedures that would be required to implement the "automatic stay" approach.

Discussion turned to the text of the proposed amendment. Justice Lynn stated that his only concern about the language is that it does not address a situation in which the newly losing party wants to file a new motion for reconsideration. He inquired whether there should be additional language to address this situation, or whether it is implicit. Attorney Honigberg agreed that there should be another phrase. After brief discussion, it was agreed that the subcommittee would address this issue and come back to the Committee in March with the final language of the proposed amended rule.

(i) 2011-021. Superior Court Pilot Rules – PAD

Carolyn Koegler inquired whether the Committee wished to consider putting the Superior Court Proportional Discovery/Automatic Pilot Rules out for public hearing. She reminded the Committee that by Order dated April 6, 2010, the Supreme Court had adopted the rules on a temporary basis, and referred the rules to the Advisory Committee on Rules for consideration as to whether they should be adopted on a permanent basis. The Committee voted in June to put the PAD Pilot rules out at the next public hearing, but voted in March 2011 not to send the rules out to public hearing in June.

Committee members stated that it was their belief that the temporary rules should be in effect for a longer period of time so that the superior court judges can provide the Committee with some information about how well the program is working. It was agreed that the Committee would revisit this issue at the June meeting.

(j) 2010-009. Drug Court Rules.

Carolyn Koegler reminded the Committee that Edda Cantor had submitted a memorandum on behalf of her subcommittee in December 2010 stating that all attendees of the subcommittee meeting had unanimously agreed that there should not be any special rules promulgated to govern the Drug Courts. The Committee agreed at the December 2010 meeting that the Committee would not advise that rules be adopted to govern the Drug Courts, but that the Committee would revisit the issue in one year.

Following brief discussion, the Committee agreed that it would not advise that rules be adopted to govern the Drug Courts, and that this item should be removed from the agenda.

5. New Items for Committee Consideration

(a) 2011-018. New Hampshire Supreme Court Rule 24.

The Committee turned next to address the question raised in Carleton v. Balagur, ___ N.H. ____ (September 22, 2011) in which the court stated that a Supreme Court order becomes final when the mandate is issued. In its opinion, the Court stated that any change to this rule is "better left to the rulemaking process.'

It was noted that the Committee had recommended in its 2011 annual report that the Supreme Court adopt a comment to Supreme Court Rule 24 to clarify that the date of the mandate, not the date of the issuance of the decision, is the effective date of an appellate court's decision. After some discussion, the Committee determined that Carleton v. Balagur required no further action by the Committee.

(b) 2011-019. New Hampshire Supreme Court Rule 55.

The Committee next considered the November 22, 2011 memorandum from Eileen Fox regarding the Public Protection Fund. Paragraph 5 of the rule provides that the public protection fund shall be administered by a committee appointed by the President of the Bar Association. It requires that the Bar Association report to the court at the end of each fund year about claims made and paid during the year and about the condition of the fund in general. The rule does not state whether the reports on the fund should be made available to the public. The Supreme Court requests that the Committee consider whether Rule 55 should be amended to make clear that the reports are considered public records.

Following some discussion, and upon motion made by Judge Cullen and seconded by Justice Lynn, the Committee voted to recommend to the Court that the public protection fund report be made public. The Committee further determined that no public hearing would be necessary.

(c) 2011-020. New Hampshire Supreme Court Rule 33(2)(b)(iii).

The Committee next considered a December 6, 2011 memorandum from Carolyn Koegler to the Committee proposing an amendment to Supreme Court Rule 33(2)(b)(iii) to require non-lawyer advocates to disclose cases in which the non-lawyer advocate has not been permitted to appear, plead, prosecute or defend any action for any party, other than himself or herself, in any court.

Speaker O'Brien suggested that an additional amendment be made to the rule to require that the non-lawyer advocate disclose any cases in which the non-

lawyer advocate's permission to appear, plead, prosecute or defend an action has been revoked. Committee members generally agreed that this additional amendment should be made.

Upon motion made by Justice Lynn, and duly seconded, the Committee voted unanimously to recommend that the Supreme Court adopt the proposed amendment, with the additional amendment suggested by Speaker O'Brien to the Supreme Court, without holding a public hearing on the matter.

6. Next Meeting

The next public meeting is scheduled for Friday, March 16, 2011, at 12:30 p.m.

7. Meeting Schedule for 2012

Friday, March 16, 2012
Friday, June 15, 2012
Friday, September 14, 2012
Friday, December 14, 2012

Upon motion made by attorney Honigberg, and seconded by attorney Ardinger, the meeting adjourned at 4:20 pm.